No. 92-1417

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

DANIEL T. MCSWEENEY and FRED C. STALDER,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Central Savings and Loan Association,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF SAVINGS & COMMUNITY BANKERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Of Counsel:
PHILIP GASTEYER
SAVINGS & COMMUNITY BANKERS OF AMERICA
900 19th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 857-3100

TIMOTHY B. DYK
(Counsel of Record)
DAVID W. RODERER
TIMOTHY E. FLANIGAN
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Counsel for Amicus Curiae Savings & Community Bankers of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Section 1821(k) of Title 12, United States Code (Section 11(k) of the Federal Deposit Insurance Act, as amended in 1989) imposes a uniform federal standard of gross negligence for FDIC actions against directors or officers of insured depository institutions.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	3
I. THE FEDERAL COURTS ARE IN CONFLICT OVER HOW TO READ § 1821(k)	3
A. Pre-FIRREA Law	5
B. The Law Since FIRREA	7
II. THE NINTH CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(k), ALLOWING THE FEDERAL REGULATORS TO SUE FOR SIMPLE NEGLIGENCE, DETERS QUALIFIED AND COMPETENT INDIVIDUALS FROM SERVING AS DIRECTORS OR OFFICERS OF FINANCIAL INSTITUTIONS	11
III. THE NINTH CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(k) DETERS FINANCIAL INSTITUTIONS FROM MAKING LOANS TO SMALLER AND NEWER BUSINESSES, THEREBY HAMPERING THE NATIONAL ECONOMY	14
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page

American Casualty Co. v. FDIC, 944 F.2d 455 (8th Cir. 1991) 12
Barnes v. Andrews, 298 F. 614 (S.D.N.Y. 1924) 7
Briggs v. Spaulding, 141 U.S. 132 (1891) 6, 7, 8, 13
City Fed. Sav. & Loan Ass'n v. Crowley, 393 F. Supp. 644 (E.D. Wis. 1975) 6
Coit Independence Joint Venture v. FSLIC, 489 U.S. 561 (1989) 3
FDIC v. American Casualty Co., 975 F.2d 677 (10th Cir. 1992) 12
FDIC v. Barham, 794 F. Supp. 187 (W.D. La. 1991) 5
FDIC v. Berry, 659 F. Supp. 1475 (E.D. Tenn. 1987) 7
FDIC v. Black, 777 F. Supp. 919 (W.D. Okla. 1991) 5
FDIC v. Brown, Civ. No. NC89-30G, 1991 WL 294524 (D. Utah. Nov. 18, 1991) 5
FDIC v. Brown, No. Civ. A. H-91-2073, 1992 WL 441799 (S.D. Tex. Dec. 10, 1992) 4
FDIC v. Burrell, 779 F. Supp. 998 (S.D. Iowa 1991) 5
FDIC v. Canfield, 967 F.2d 443 (10th Cir.) (*en banc*), *cert. dismissed*, 113 S. Ct. 516 (1992) 4, 7, 9, 12, 15
FDIC v. Fay, 779 F. Supp. 66 (S.D. Tex. 1991) 5
FDIC v. Haddad, 778 F. Supp. 1559 (S.D. Fla. 1991) 5
FDIC v. Howse, 802 F. Supp. 1554 (S.D. Tex. 1992) 5
FDIC v. Isham, 777 F. Supp. 828 (D. Colo. 1991) 5, 8
FDIC v. McSweeney, 976 F.2d 532 (9th Cir. 1992) 4
FDIC v. Miller, 781 F. Supp. 1271 (N.D. Ill. 1991) 5
FDIC v. Mintz, No. 92-6779-CIV-GONZALEZ, 1993 WL 85734 (S.D. Fla. March 2, 1993) 4, 9
FDIC v. Nihiser, 799 F. Supp. 904 (C.D. Ill. 1992) 5

TABLE OF AUTHORITIES—Continued

Page

FDIC v. Swager, 773 F. Supp. 1244 (D. Minn. 1991) 5, 8, 9

FDIC v. Williams, 779 F. Supp. 63 (N.D. Tex. 1991) 5

Fidelity & Deposit Co. of Maryland v. Connor, 973 F.2d 1236 (5th Cir. 1992) 12

First Hawaiian Bank v. Alexander, 558 F. Supp. 1128 (D. Hawaii 1983) 6

FSLIC v. Kidwell, 716 F. Supp. 1315 (N.D. Cal. 1989), *vacated without op. in part, Eureka Fed. Sav. & Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991) 6

FSLIC v. Sheiton, 789 F. Supp. 1360 (M.D. La. 1992) 5

FSLIC v. Ticktin, 490 U.S. 82 (1989) 3

Gaff v. FDIC, 919 F.2d 384 (6th Cir. 1990), *modified on rehearing on other grounds*, 933 F.2d 400 (6th Cir. 1991) 4, 8, 9

Home Sav. Bank v. Gilliam, 952 F.2d 1152 (9th Cir. 1991) 4

Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819 (N.D. Ill. 1975) 6

RTC v. Aycock, Civ. A. No. 92-761, 1992 WL 373532 (E.D. La. Dec. 4, 1992) 4

RTC v. Evans, Civ. A. No. 92-0756, 1992 WL 142508 (E.D. La. June 15, 1992) 5

RTC v. Gallagher, 800 F. Supp. 595 (N.D. Ill. 1992), *appeal filed*, Nos. 92-4023, 92-8060 (7th Cir. Nov. 30, 1992) 5, 9, 10

RTC v. Miramon, Civ. A. No. 92-2672, 1992 WL 373635 (E.D. La. Dec. 9, 1992) 4

RTC v. Ryan, 801 F. Supp. 1545 (S.D. Miss. 1992) 4

Spering's Appeal, 71 Penn. St. 11, 10 Am. Rep. 684 (1872) 13

St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695 (8th Cir. 1992) 12

United States v. Gaubert, 111 S. Ct. 1267 (1991) 3

Washington Bancorporation v. Said, No. Civ. A. 88-3111 (RCL), 1993 WL 41766 (D.D.C. Feb. 17, 1993) 4, 7, 10, 13

TABLE OF AUTHORITIES—Continued

STATUTES Page

Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989) 3

Sec. 212(a), 12 U.S.C. § 182(k) (Supp. I 1989) ..... *passim*

Fla. Stat. Ann. § 607.0831 (West 1993) 6

Ind. Code Ann. § 23-1-35-1(e) (West 1991) 6

Me. Rev. Stat. Ann., tit. 13A, § 716 (West Supp. 1992) 6

Ohio Rev. Code Ann. § 1701.59(D) (Anderson 1992) 6

Wis. Stat. Ann. § 180.0828(1) (West 1992) 6

LEGISLATIVE HISTORY

Consolidation of the Professional Liability Section of the RTC Legal Division: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 102 Cong., 2d Sess. (Oct. 1, 1992) 4, 11

Prosecuting Fraud in the Thrift Industry: Hearings on H.R. 1278 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. (1989) 13

135 Cong. Rec. S4264 (daily ed. Apr. 19, 1989) 14

135 Cong. Rec. S4276 (daily ed. Apr. 19, 1989) 14

MISCELLANEOUS

American Association of Bank Directors, *1992 Survey of RTC Suits Against Officers and Directors* (draft, to be published April 1993) 4

Lloyd Bentsen, Secretary of the Treasury, White House Annnouncement of President Clinton's Plan for Relief of the "Credit Crunch" Problem (March 10, 1993) 14

Brief of Appellant, *RTC v. Gallagher*, Nos. 92-4023, 92-8060 (7th Cir. filed Jan. 25, 1993) 7

TABLE OF AUTHORITIES—Continued

Page

James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 Law & Contemp. Probs. 83 (Summer 1985) 14

David B. Fischer, Comment, *Bank Director Liability Under FIRREA: A New Defense For Directors And Officers Of Insolvent Depository Institutions—Or A Tighter Noose?*, 39 U.C.L.A. L. Rev. 1703 (1992) 5, 7, 10, 11, 12

James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988) 6

John D. Hawke, Jr., *The Limited Role of Directors in Assuring the Soundness of Banks*, 6 Ann. Rev. Banking L. 285 (1987) 13

Industry Voices Concern Over FDIC Efforts To Gain Power To Sue For Simple Negligence, The FDIC Watch, Sept. 20, 1991 15

L.H. Otis, *D & O Buyers, Insurers Face Banks' Bailout Toll*, Prop. & Cas./Risk & Benefits Mgmt. Ed., Apr. 29, 1991, at 13 12

Remarks at the Democratic Governors' Association Dinner, 29 Weekly Comp. Pres. Doc. 121 (Feb. 8, 1993) 14

Timothy Ryan, *First, Kill All The Lawyers*, National Mortgage News, Sept. 14, 1992, at 4 5

Jon Shepherd, Note, *The Liability of Officers and Directors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 90 Mich. L. Rev. 1119 (1992) 11

Thomas P. Vartanian & Michael D. Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021 (1984) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1417

DANIEL T. MCSWEENEY and FRED C. STALDER,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Central Savings and Loan Association,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF SAVINGS & COMMUNITY BANKERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE *

Savings & Community Bankers of America (SCBA) is the national trade organization for the savings industry. Its 1900 members include federal and state-chartered institutions, stockholder or mutually-owned, throughout the United States, its territories and possessions. The trade group serves its members through government and public affairs, technical assistance, educational products and programs, publications, meetings, and subsidiary activities which augment the operations of savings institutions. Among other things, SCBA provides information to the

---

* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court.

officers and directors of its individual members on how to comply with the requirements of federal and state law and regulation.

Review in this case is important both because the Ninth Circuit's construction of § 1821(k) is demonstrably incorrect, and because § 1821(k) is implicated in virtually every Federal Deposit Insurance Corporation ("FDIC") or Resolution Trust Corporation ("RTC") action against directors and officers of failed financial institutions. Numerous of these actions, including numerous administrative actions, have been brought by the agencies, thus indicating that § 1821(k) will remain a statute of substantial importance for years to come.

The Ninth Circuit's construction of § 1821(k) and the uncertainty and confusion engendered by conflicting court interpretations as to the proper construction of that section pose significant concerns to SCBA, its members, and the national credit markets. The exposure of directors and officers of financial institutions to personal liability for acts of simple negligence in suits brought by federal regulators has discernibly adverse consequences for the industry and for the quality of financial services throughout the country. *First*, recruiting and retaining competent people to become officials of financial institutions will become an even more difficult task. Qualified director and officer candidates are too often dissuaded from accepting those positions by the threat of personal liability for acts which, when viewed with hindsight by federal regulators, may be found to be simply negligent. *Second*, the uncertain threat of needing to defend against unwarranted simple negligence suits is likely to contribute to overly cautious lending by financial institutions, and thereby stifle the flow of essential capital to users, particularly smaller and newer borrowers, thus exacerbating the nation's economic problems and the country's "credit crunch." *Third*, the confusion among the courts results in disparate treatment of individuals charged by the government in different cases.

SCBA is filing this brief *amicus curiae* to encourage this Court to grant review of the Ninth Circuit's decision and to alleviate the current confusion over the proper construction of § 1821(k). This statute has been interpreted at least six different ways; thus, the lower courts are unlikely to agree as to its interpretation.

REASONS FOR GRANTING THE WRIT

In recognition of the need for prompt resolution of important issues involving the mass of litigation arising from the savings and loan crisis of the last decade, this Court has granted review in a number of cases involving an important issue of a federal agency's regulatory authority on which the lower courts are in conflict. *See, e.g., United States v. Gaubert*, 111 S. Ct. 1267 (1991); *FSLIC v. Ticktin*, 490 U.S. 82, 87-88 (1989); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 568 (1989). This case similarly warrants review.

I. THE FEDERAL COURTS ARE IN CONFLICT OVER HOW TO READ § 1821(k).

The question presented by this case is whether Section 11(k) of the Federal Deposit Insurance Act, as amended by § 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, 222 (1989) (codified at 12 U.S.C. § 1821(k) (Supp. I 1989) and herein referred to as "§ 1821(k)")[1] imposes a uniform federal standard

---

[1] Section 1821(k) of Title 12, United States Code provides:

> A director or officer of an insured depository institution may be held personally liable for monetary damages in any civil action by, or on behalf of, or at the request or direction of the Corporation, which action is prosecuted wholly or partially for the benefit of the Corporation—
>
> (1) acting as conservator or receiver of such institution,

of gross negligence for FDIC and RTC actions against directors and officers of failed financial institutions. Counts of simple negligence appear in virtually every § 1821(k) suit commenced by the FDIC or the RTC.[2] The list of reported cases involving § 1821(k) is growing rapidly,[3] and this growth will continue: As of Sep-

---

(2) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed by such receiver or conservator, or

(3) acting based upon a suit, claim, or cause of action purchased from, assigned by, or otherwise conveyed in whole or in part by an insured depository institution or its affiliate in connection with assistance provided under Section 1821 of this title, for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State Law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

[2] *Consolidation of the Professional Liability Section of the RTC Legal Division: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong., 2d Sess. 367 (Oct. 1, 1992) (Statement of Albert V. Casey, President and CEO of the RTC, indicating that, between January 1, 1992 and September 15, 1992, the RTC had filed 94 directors and officers lawsuits; 90 of those suits named outside directors, and all 90 of those included counts of simple negligence). *See also* American Association of Bank Directors, *1992 Survey of RTC Suits Against Officers and Directors* (draft, to be published April 1993).

[3] *FDIC v. McSweeney*, 976 F.2d 532 (9th Cir. 1992); *FDIC v. Canfield*, 967 F.2d 443 (10th Cir.) *(en banc)*, *cert. dismissed*, 113 S. Ct. 516 (1992); *Home Sav. Bank v. Gilliam*, 952 F.2d 1152 (9th Cir. 1991); *Gaff v. FDIC*, 919 F.2d 384 (6th Cir. 1990), *modified on rehearing on other grounds*, 933 F.2d 400 (6th Cir. 1991); *FDIC v. Mintz*, No. 92-6779-CIV-GONZALEZ, 1993 WL 85734 (S.D. Fla. March 2, 1993); *Washington Bancorporation v. Said*, No. Civ. A. 88-3111 (RCL), 1993 WL 41766 (D.D.C. Feb. 17, 1993); *FDIC v. Brown*, No. Civ. A. H-91-2073, 1992 WL 441799 (S.D. Tex. Dec. 10, 1992); *RTC v. Miramon*, Civ. A. No. 92-2672, 1992 WL 373635 (E.D. La. Dec. 9, 1992); *RTC v. Aycock*, Civ. A. No. 92-761, 1992 WL 373532 (E.D. La. Dec. 4, 1992); *RTC v. Ryan*, 801 F. Supp. 1545

tember 1992, over 300 civil damages actions had been filed by the FDIC or RTC.[4]

By concluding that § 1821(k) does not preempt claims of simple negligence against directors and officers of failed financial institutions, the Ninth Circuit has further contributed to an already-widespread conflict among the federal courts which have interpreted § 1821(k).

Section 1821(k) was enacted against a background of uncertainty. This uncertainty extended not only to the question of what the proper standard of care was for officials of banks and thrifts, but what law—federal or state—established that standard of care.

A. Pre-FIRREA Law. Before the enactment of FIRREA, a patchwork of state statutes and common law governed the standard of care of officers and directors of financial institutions. Many states enacted statutes making gross negligence the applicable standard of care for directors and officers. *See generally* David B. Fischer, Comment, *Bank Director Liability Under FIRREA: A New Defense For Directors And Officers Of Insolvent Depository Institutions—Or A Tighter Noose?*, 39 U.C.L.A.

(S.D. Miss. 1992); *RTC v. Gallagher*, 800 F. Supp. 595 (N.D. Ill. 1992), *appeal filed*, Nos. 92-4023, 92-8060 (7th Cir. Nov. 30, 1992); *RTC v. Evans*, Civ. A. No. 92-0756, 1992 WL 142508 (E.D. La. June 15, 1992); *FDIC v. Howse*, 802 F. Supp. 1554 (S.D. Tex. 1992); *FSLIC v. Shelton*, 789 F. Supp. 1360 (M.D. La. 1992); *FDIC v. Nihiser*, 799 F. Supp. 904 (C.D. Ill. 1992); *FDIC v. Barham*, 794 F. Supp. 187 (W.D. La. 1991); *FDIC v. Williams*, 779 F. Supp. 63 (N.D. Tex. 1991); *FDIC v. Brown*, Civ. No. NC89-30G, 1991 WL 294524 (D. Utah Nov. 18, 1991); *FDIC v. Miller*, 781 F. Supp. 1271 (N.D. Ill. 1991); *FDIC v. Isham*, 777 F. Supp. 828 (D. Colo. 1991); *FDIC v. Black*, 777 F. Supp. 919 (W.D. Okla. 1991); *FDIC v. Swager*, 773 F. Supp. 1244 (D. Minn. 1991); *FDIC v. Fay*, 779 F. Supp. 66 (S.D. Tex. 1991); *FDIC v. Haddad*, 778 F. Supp. 1559 (S.D. Fla. 1991); *FDIC v. Burrell*, 779 F. Supp. 998 (S.D. Iowa 1991).

[4] Timothy Ryan, *First, Kill All The Lawyers*, National Mortgage News, Sept. 14, 1992, at 4.

L. Rev. 1703, 1716 & n.51 (1992). However, not every state did. Others allowed directors and officers to be sued for simple negligence; a handful of others (five) have enacted "insulating statutes," which require a showing of willful and wanton conduct before liability can be imposed.[5] *See generally* James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 Bus. Law. 1207 (1988).

Still another view was that federal common law governed the responsibilities of officers and directors of at least federally-chartered institutions. *See, e.g., Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n*, 405 F. Supp. 819, 826-27 (N.D. Ill. 1975); *City Fed. Sav. & Loan Ass'n v. Crowley*, 393 F. Supp. 644, 655 (E.D. Wis. 1975).[6] But even in those cases where federal common law, rather than a state statute, was held to apply, the standard of care expected of bank and thrift officials was unclear.

The relevant federal common law is traceable to this Court's decision in *Briggs v. Spaulding*, 141 U.S. 132 (1891). In *Briggs*, this Court provided what one court has called the "classic formulation of a fiduciary's duty of care."[7] The Court held that, under common law, bank directors

> must exercise *ordinary care and prudence* in the administration of the affairs of a bank . . . . They are

---

[5] Fla. Stat. Ann. § 607.0831 (West 1993); Ind. Code Ann. § 23-1-35-1(e) (West 1991); Me. Rev. Stat. Ann., tit. 13A, § 716 (West Supp. 1992); Ohio Rev. Code Ann. § 1701.59(D) (Anderson 1992); Wis. Stat. Ann. § 180.0828(1) (West 1992).

[6] Additionally, at least one court applied federal common law to determine the fiduciary duties owed by officers of a *state*-chartered bank. *See First Hawaiian Bank v. Alexander*, 558 F. Supp. 1128, 1132 (D. Hawaii 1983).

[7] *FSLIC v. Kidwell*, 716 F. Supp. 1315, 1317 (N.D. Cal. 1989), *vacated without op., in part, Eureka Fed. Sav. & Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991).

> entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, *if that ignorance is the result of gross inattention* . . . .

Id. at 165-66 (emphasis added). The italicized portions of *Briggs* created numerous problems of interpretation. Some have seized upon the "ordinary care and prudence" language and concluded that pre-FIRREA federal common law imposed a simple negligence standard of care. *See, e.g., FDIC v. Berry*, 659 F. Supp. 1475 (E.D. Tenn. 1987). The FDIC has taken that position in a case currently on appeal to the Seventh Circuit. *See* Brief of Appellant at 5, *RTC v. Gallagher*, Nos. 92-4023, 92-8060 (7th Cir. filed Jan. 25, 1993). Others have noted the "gross inattention" language in the last quoted sentence and concluded that the rule of *Briggs* is *gross* negligence. *See, e.g.*, Fischer, *supra*, at 1713-15.[8] In 1924, Judge Learned Hand was so confounded by *Briggs* that he concluded it was of little guidance to him—he called it "a case decided by a narrow margin, which to-day would probably have gone the other way." *Barnes v. Andrews*, 298 F. 614, 616 (S.D.N.Y. 1924).

B. **The Law Since FIRREA.** FIRREA was enacted against this background. The government takes the position that § 1821(k) preempts only those five state "insulating statutes" in cases in which FDIC or RTC sues the directors or officers of failed financial institutions. *See, e.g., FDIC v. Canfield*, 967 F.2d 443, 445 (10th Cir.) (*en banc*) (FDIC contends that § 1821(k) "preempts only those state laws that require a higher degree of culpability than gross negligence"), *cert. dismissed*, 113 S. Ct. 516 (1992). The FDIC contends that the preemption of such state laws that set higher standards

---

[8] *See also Washington Bancorporation v. Said*, 1993 WL 41766, at *7.

is all that § 1821(k) does, and that state law standards of lesser care are available to the federal government in actions in some states.

The courts are split on the issue presented by this case, which is whether § 1821(k) also preempts state laws which allow directors and officers to be sued for simple negligence. At least six different federal court constructions of § 1821(k) have emerged. Two views of the statute start from the premise that the plain language answers the question. But those courts that view the language as plain and unambiguous have reached opposite conclusions. Some have held, as did the Ninth Circuit below, that the plain language of § 1821(k) indicates that Congress meant to allow suits sounding in simple negligence, where applicable state law would allow such a suit. *See* Pet. Cert. at A-11; *see also FDIC v. Canfield*, 967 F.2d at 449. Others have held, however, that the plain language compels a nationwide standard of *gross* negligence, as did Judge Devitt in *FDIC v. Swager*, 773 F. Supp. 1244, 1247-48 (D. Minn. 1991).

The third and fourth approaches read the language of § 1821(k) as ambiguous, and resort to canons of construction and legislative history to inform the construction of the statute. Here, too, there is disagreement. *Compare Gaff v. FDIC*, 919 F.2d 384, 391 (6th Cir. 1990) (the legislative history "explicitly states an intent to nationalize the law of directors' and officers' liability when banks are taken over by the FDIC"), *modified on rehearing on other grounds*, 933 F.2d 400 (6th Cir. 1991),[9] *with, e.g., FDIC v. Isham*, 777 F. Supp. 828,

---

[9] *Gaff* addressed the question of whether federal common law governed legal issues concerning the ownership, priority, and adjustment of claims by stockholders against a federally-chartered bank, its directors, and its officers. In holding that federal common law did apply, the Sixth Circuit relied, in part, on the fact that § 1821(k) represented Congress's "intent to nationalize the law of directors'

831, 832 (D. Colo. 1991) (concluding that "[b]oth plaintiff and defendant construe the clause plausibly," but relying on legislative history to conclude that simple negligence suits, where available, were not preempted by § 1821(k)).

A fifth approach to the § 1821(k) controversy makes the applicable standard of care dependent on the origin of the financial institution's charter. Most recently, this approach has been taken by the United States District Court for the Northern District of Illinois in *RTC v. Gallagher*, 800 F. Supp. 595 (N.D. Ill. 1992), *appeal filed*, Nos. 92-4023, 92-8060 (7th Cir. Nov. 30, 1992), and by the United States District Court for the Southern District of Florida in *FDIC v. Mintz*, No. 92-6779-CIV-GONZALEZ, 1993 WL 85734 (S.D. Fla. March 2, 1993). The court in *Gallagher* bifurcated its inquiry, stating that § 1821(k) does not preempt state law of director and officer liability, but *does* preempt prior federal common law on the subject. *Id.* at 601-02. *See also FDIC v. Mintz*, 1993 WL 85734, at *5 ("This reading of the statute (that federal law is preempted but state law is not) can be characterized as 'splitting the baby.'"). Under such reasoning, when the FDIC sues officials of a federally-chartered institution, no state law causes of action for breach of fiduciary duty are available to it (or were available to it prior to FIRREA), since the action is entirely a creature of federal law. *Id.* at 602. In *Gallagher*, which involved officials of a federally-chartered

---

and officers' liability when banks are taken over by the FDIC." 919 F.2d at 391.

The Ninth Circuit characterized the Sixth Circuit's discussion of § 1821(k) as *dicta*. See Pet. Cert. at A-8 n.4. However, as noted by Judge Devitt in *FDIC v. Swager*, "the [Sixth Circuit's] conclusion respecting § 1821(k) contributed meaningfully to the disposition of the issues before it and, therefore, may not be dismissed as mere verbosity." 773 F. Supp. at 1247. *See also FDIC v. Canfield*, 967 F.2d at 449 n.2 (Brorby, J., dissenting). The fact that courts have followed *Gaff*'s construction of § 1821(k) indicates that it has much more vitality than mere *dicta*.

bank, the court thus concluded that the FDIC was required to plead "gross negligence" on the part of the defendants. *Id.*

Yet a sixth approach to § 1821(k) appears in a recent case from the United States District Court for the District of Columbia. In *Washington Bancorporation v. Said*, Civ. A. No. 88-3111(RCL), 1993 WL 41766 (D.D.C. Feb. 17, 1993), a case involving a nationally-chartered bank located in the District of Columbia, which was decided after *Canfield* and *McSweeney*, the court, interpreting § 1821(k), fashioned an unprecedented "sliding scale" standard of care for such suits against directors and officers. The court explained:

> For instance, if a bank is seeking to loan a great amount of capital to a new customer and the subject of the loan is an area with which the bank is unfamiliar (for instance, a local savings and loan investing for the first time in speculative oil fields), the bank directors would be under an obligation to thoroughly investigate the prudence of making such a loan. However, for other transactions and actions, those that are more routine, the gross negligence standard applies.

Washington Bancorporation, 1993 WL 41766, at *7.

Expeditious resolution by this Court of the confusing array of lower court interpretations of § 1821(k) is thus essential not only to the parties to the immediate litigation, but to all of the cases arising out of failures of financial institutions. In light of the wide variety of interpretations that the federal courts have given to § 1821(k), it is highly unlikely that the lower federal courts will agree on a uniform interpretation of § 1821(k).[10]

---

[10] Even the commentators who have written on § 1821(k) have reached opposite conclusions. One has concluded that § 1821(k) formalizes a nationally uniform standard of *gross* negligence. David B. Fischer, Comment, *Bank Director Liability Under FIRREA: A*

II. THE NINTH CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(k), ALLOWING THE FEDERAL REGULATORS TO SUE FOR SIMPLE NEGLIGENCE, DETERS QUALIFIED AND COMPETENT INDIVIDUALS FROM SERVING AS DIRECTORS OR OFFICERS OF FINANCIAL INSTITUTIONS.

Statistically, "officers, directors, and other insiders of a federally insured bank or thrift institution are more likely now than at any other time during the last half-century to find themselves the named defendants in civil or criminal actions initiated by a federal regulator." [11] These words, written in 1984 by the former General Counsel of the now-defunct Federal Home Loan Bank Board, ring even more true today, as the federal government sends "threatening signals to prospective directors that it is 'cracking down' on the entire industry and imposing unprecedented monetary punishments." Fischer, *supra*, at 1783.[12]

Lending transactions are often extremely complicated, and are entered into in large volume by insured lenders. Under a simple negligence standard, if a loan later proves to be uncollectable, it is all too easy for a federal regulator to allege, and for a jury to find, that the transaction violated a simple negligence standard of care.

New Defense for Directors and Officers of Insolvent Depository Institutions—Or a Tighter Noose?, 39 U.C.L.A. L. Rev. 1703, 1789 (1992). Another argues that plain language and legislative history support a contrary reading. *See* Jon Shepherd, Note, *The Liability of Officers and Directors Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 90 Mich. L. Rev. 1119, 1122-23 (1992).

[11] Thomas P. Vartanian & Michael D. Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021, 1021 (1984).

[12] The President and CEO of the Resolution Trust Corporation recently told a Senate committee that his agency continues to be "committed to an aggressive [professional liability litigation] program." *Consolidation of the Professional Liability Section of the RTC Legal Division: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, supra* n.2, at 370.

Moreover, under today's insurance policies, this personal liability is likely to be uninsured, and uninsurable. While in other matters directors' and officers' liability concerns are usually assuaged by director and officer ("D & O") liability insurance policies, approximately 75% of the D & O liability insurance policies currently written contain "regulatory exclusion" clauses, which give the insurers the right to deny coverage when insureds are sued by federal regulators. Fischer, *supra*, at 1707 n.23. The insurers are successfully denying coverage in many such suits. One of the largest writers of regulatory D & O insurance is involved in over 100 lawsuits involving D & O claims, "fighting to the end of the majority of them," and "winning more than we are losing." L.H. Otis, *D & O Buyers, Insurers Face Banks' Bailout Toll*, Prop. & Cas./Risk & Benefits Mgmt. Ed., Apr. 29, 1991, at 13.[13] Moreover, to the extent that D & O insurance policies provide coverage, any judgment is likely to exceed the policy limits, thus subjecting the official to substantial personal liability for simple negligence under the view of the Ninth Circuit.

Such a result is directly at odds with the "long recognized need to attract and retain bright, ambitious community leaders to serve as officers and directors." *FDIC v. Canfield*, 967 F.2d at 451 (Brorby, J., dissenting).[14]

---

[13] The Courts of Appeals have uniformly upheld and enforced the regulatory exclusion clauses. *See, e.g., FDIC v. American Casualty Co.*, 975 F.2d 677, 681-82 (10th Cir. 1992); *Fidelity & Deposit Co. of Maryland v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695, 702 (8th Cir. 1992); *American Casualty Co. v. FDIC*, 944 F.2d 455, 460-61 (8th Cir. 1991). *See also* Fischer, *supra* n.10, at 1707 n.23.

[14] This need was recognized in published decisions involving bank director liability over 100 years ago:

> . . . But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were

Before FIRREA, this task was becoming "increasingly difficult." [15] One federal judge has expressed the view that, under the construction of § 1821(k) advocated by the Ninth (and Tenth) Circuits, "no reasonable attorney would advise his client to accept, and no reasonable person would accept an offer to become a bank officer or director." *FDIC v. Canfield*, 967 F.2d at 451 (Brorby, J., dissenting).[16] Whatever the effect, the Ninth Circuit's interpretation of § 1821(k) clearly aggravates the problem of attracting competent directors and officers.[17]

> such a rule applied, no gentlemen of character and responsibility would be found willing to accept such places.

Spering's Appeal, 71 Penn. St. 11, 20, 10 Am. Rep. 684 (1872). *See also Briggs v. Spaulding*, 141 U.S. 132, 149 (1891) (quoting *Spering's Appeal*).

[15] John D. Hawke, Jr., *The Limited Role of Directors in Assuring the Soundness of Banks*, 6 Ann. Rev. Banking L. 285, 287 (1987). *See also Prosecuting Fraud in the Thrift Industry: Hearings on H.R. 1278 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 98-99 (1989) (comments of John K. Villa, bank attorney and author); *id.* at 278-79 (statement of Edward L. Yingling, executive director of government relations for the American Bankers Association).

[16] *See also Washington Bancorporation v. Said*, 1993 WL 41766, at *8 ("To impose liability on directors for these good-faith business decisions, however, would effectively destroy the corporate system in this country, for no individuals would serve as officers and directors.").

[17] The concern over attracting competent directors and officers was also expressed on the floor of the Senate in the debate surrounding the drafting of FIRREA's director liability statute:

> I believe that these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions. The bill as [originally] drafted would have preempted numerous State laws which provide limited indemnification for directors and officers. These State laws were enacted largely in response to problems faced by corporations in attracting good officers and directors. Problems also occurred in obtaining directors and officers insurance due to potential law suits against

III. THE NINTH CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(k) DETERS FINANCIAL INSTITUTIONS FROM MAKING LOANS TO SMALLER AND NEWER BUSINESSES, THEREBY HAMPERING THE NATIONAL ECONOMY.

Government officials, including the President, have suggested that financial institutions' reluctance to extend loans poses a formidable obstacle to the current efforts for a national economic recovery, and easing the percieved "credit crunch," in which lenders are reluctant to lend to small businesses, is one of the cornerstones of the President's economic program.[18]

This "credit crunch" is seen by many to be attributable, in large part, to overly restrictive governmental regulation, *see* Lloyd Bentsen, Secretary of the Treasury, White House Announcement of President Clinton's Plan for Relief of the "Credit Crunch" Problem (March 10, 1993) ("We don't want lenders that are afraid of their government to the point that they won't make loans that will help us grow."), as well as to liability concerns on the part of financial institutions' officers and directors that serve as the "cornerstone of the boardroom culture" experienced by "today's director." James D. Cox & Harry

---

these directors and officers personally based on even simple negligence claims. . . .

. . . The amendment would permit the FDIC to bring an action . . . if the director or officer acted with gross negligence or committed an intentional tort.

135 Cong. Rec. S4276-77 (daily ed. Apr. 19, 1989) (remarks of Sen. Sanford). *See also id.* at S4264 (remarks of Sen. Heflin) ("financial institutions may lose effective directors, maybe an entire board of directors").

[18] "So we can have a strong economy on the surface where the stock market is booming, but if small-business people can't get bank loans at the local bank, jobs won't be created for all these people that are losing their big employee jobs." Remarks at the Democratic Governors' Association Dinner, 29 Weekly Comp. Pres. Doc. 121, 124 (Feb. 8, 1993).

L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 Law & Contemp. Probs. 83, 89 (Summer, 1985).

The imposition of liability for simple negligence in actions and suits brought by the federal regulators only makes the problem worse. Each officer and director must ask whether his or her actions, in the light of hindsight, might be seen as negligent by a jury in a suit brought by a federal government agency.[19] Lending, by its very nature, is a risky enterprise; "however, it is not possible to [manage that risk] in a manner that results in no losses or only in losses that will be found in retrospect to have been unavoidable." *FDIC v. Canfield*, 967 F.2d at 451-52 (Brorby, J., dissenting). If the Ninth Circuit's decision stands, allowing the federal regulators to hold officials of financial institutions liable for simple negligence, the reticence of lenders to lend will be increased.

---

[19] "[T]his could mean [that the FDIC] could second guess every loan approved by the institution, which subsequently, because of national or regional adverse economic consequences, went bad." *Industry Voices Concern Over FDIC Efforts To Gain Power To Sue For Simple Negligence*, The FDIC Watch, Sept. 20, 1991.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
PHILIP GASTEYER
SAVINGS & COMMUNITY
BANKERS OF AMERICA
900 19th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 857-3100

TIMOTHY B. DYK
(Counsel of Record)
DAVID W. RODERER
TIMOTHY E. FLANIGAN
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
Counsel for Amicus Curiae
Savings & Community
Bankers of America

April 6, 1993